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NEW DIRECTIONS IN DESEGREGATION LITIGATION

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ABSTRACT

New Directions in Desegregation Litigation

Recent judicial rulings seem to have confused rather than clarified the scope of remedies available to effect desegregation in American public schools. This paper focuses on the controversy surrounding the de jure/de facto double standard and the determination of unlawful state intent. Recent desegregation cases are analyzed and related to the Supreme Court's posture in other decisions involving civil rights. Although trends are difficult to ascertain, it appears that courts are becoming more hesitant to uncover constitutional violations and to order massive student reassignment plans as remedial measures. It is quite possible that desegregation cases are simply part of a larger judicial phenomenon that is indicative of retrenchment from the activist Warren Court era. It may be that this decade will witness the emergence of a new definition of discrimination.

New Directions in Desegregation Litigation

Legally-sanctioned school segregation is unlawful under the Constitution of the United States; this fact is indisputable. When evidence of such de jure segregation is produced, state officials are obligated to take affirmative steps to remedy the situation. In short, federal courts have broad discretionary powers to effect relief when blatant racial discrimination in public schools can be traced directly to state action. So far, the scenario is simple, but it is deceptively simple. The complications start to multiply in geometric proportions as one analyzes recent developments in the school desegregation arena. The continuing controversies over the de jure/de facto double standard and the scope of federal courts' powers to order interdistrict remedies seem to hinge on whether a finding of unlawful state intent is present. The focus of this paper, therefore, is on the evolution of the Supreme Court's interpretation of the factors necessary to establish unconstitutional state intent in school desegregation litigation.

De Jure Versus De Facto Segregation: A Dubious Distinction

Traditionally, the term de jure segregation has been used to connote segregation by law. The notion of de jure segregation also has been extended to cover those situations where overt acts of school officials, such as school district gerrymandering, have obviously encouraged school segregation. De facto segregation, conversely, has been defined as segregation which exists in fact but is not the result of intentional discriminatory action on the part of government officials.

Until 1971 courts did not deal extensively with de facto segregation and usually rejected de facto concerns as beyond the scope of the original Brown decision.[1] Courts held that while public school students have a constitutional right to avoid being the objects of discrimination, they do not have a constitutional right to attend or refrain from attending any particular school on the basis of racial considerations unless there has been overt discrimination against them. For example, in both Bell v. School City of Gary, Indiana and Deal v. Cincinnati Board of Education the federal courts reiterated that de facto segregation was not unconstitutional as long as it resulted from racially isolated residential patterns and involved no deliberate attempts to impede integration.[2]

There has not been unanimity, however, among justices when they have decided public school desegregation cases in areas other than the South. In contrast to the Bell and Deal decisions, during the early 1970's several lower courts started to blur the distinction between de jure and de facto segregation. In Hobson v. Hansen, the federal district court in Washington, D.C. extended a school district's affirmative duty to achieve integration to include situations of de facto segregation resulting from "unintentional" administrative practices.[3] In the court's view, racially homogeneous schools damage the minds and spirits of all children who attend them regardless of whether the segregation exists by law or due to natural conditions.

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[1] Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[2] Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964); Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967).

[3] 269 F.Supp. 401 (D.D. C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

Similarly, in 1970 a federal district court in California held that school authorities have a duty to remedy segregation resulting from the exercise of powers in a manner which creates, continues, or increases substantial racial imbalance in schools "regardless of the motivation" of school officials.[4] Also, in 1972 a federal district court in Minneapolis held that the Constitution applies equally to all public school systems, regardless of whether segregation is imposed by statute or covertly.[5] Thus, several lower courts have evaluated the operative effect of school policies and practices rather than whether or not racial hostility was present, and a large number of jurisdictions have ruled that de facto segregation must be corrected.[6]

Civil rights groups have challenged the contention that where segregation is de facto, no duty to correct is required. They have questioned whether the origins of "natural" racial isolation in non-southern states were as "innocent" as has been previously assumed.[7] Proponents of erasing

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[4]Spangler v. Pasadena City Board of Educ., 311 F.Supp. 501 (C.D. Cal. 1970).

[5]Booker v. Special School Dist. No. 1, Minneapolis, Minn., 351 F.Supp. 799 (D. Minn. 1972).

[6]See Davis v. School Dist. of City of Pontiac, 309 F.Supp. 734 (E.D. Mich. 1970), aff'd 443 F.2d 573 (6th Cir. 1971), cert. denied, 404 U.S. 913 (1971); United States v. School Dist. 151 of Cook County, Illinois, 286 F.Supp. 786 (N.D. Ill. 1968), aff'd 404 F.2d 1125 (7th Cir. 1969), cert. denied, 402 U.S. 943 (1971); Soria v. Oxnard School Dist. Bd. of Trustees, 328 F.Supp. 155 (C.D. Cal. 1971); People v. San Diego Unified School Dist., 19 Cal. App. 3d 352 (Ct. App. 1971); United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972); Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 920 (1973); School Comm'rs of Boston v. Bd. of Educ., 302 N.E.2d 916 (D. Mass. 1973); Moss v. Stamford Bd. of Educ., 356 F.Supp. 675 (D. Conn. 1973); Spangler, supra; Booker, supra; Hobson, supra.

[7]See "Busing: A Constitutional Precipice," 8 Suffolk L. Rev. 48 (1972).

the de jure/de facto distinction have claimed that affirmative state action can be found in almost any situation where segregated schools exist. Support for this argument is provided by the fact that states regulate very specific aspects of schools from curriculum offerings to teacher certification. In addition, the ultimate responsibility for designing and redesigning school districts rests at the state level. Thus, it is asserted that any existing school segregation can be attributed to state action and must be remedied by state officials. Furthermore, prior to the late 1940's, housing patterns were controlled in most sections of the country through the device of restrictive covenants which were sanctioned by the government; such covenants caused the emergence of racially and economically homogeneous neighborhoods and schools. Consequently, it is argued that segregated schools resulting from such circumstances should be considered as de jure in nature as those schools formerly segregated by law.[8] This type of segregation is particularly significant in large metropolitan areas where there is a high percentage of black students who are mainly concentrated in well-defined residential sections of the central city, while most of the white students live in virtually all-white suburban areas.

Some legal commentators argue that the presumed differences between de facto segregation and de jure segregation have no factual basis.[9] Those favoring the abolition of the distinction between de facto and de jure segregation insist that a national standard in school desegregation remedies should be enforced.[10] Without national criteria that are uniformly applied,

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[8] Id. at 57-59.

[9] David L. Kirp, "Race, Politics, and the Courts: School Desegregation in San Francisco," 46 Harv. Educ. Rev. 572 (1976).

[10] See Dale T. Brinkman, "'Intention' as a Requirement for De Jure School Segregation," 37 Ohio State L. J. 653 (1976).

it is alleged that the legal requirements involving desegregation represent an unfair double standard between the northern and southern states.

Although the Supreme Court initially was hesitant to enter the de jure/de facto controversy, finally in 1973 it delivered an opinion regarding segregated schools outside the South. This decision, Keyes v. School District Number 1, involved alleged discrimination in the Denver public schools.[11] In a 7-1 decision, the Supreme Court held that where a policy of intentional segregation has been established with respect to a significant portion of a school system, the burden is on the school authorities to prove that their actions as to other segregated schools in the system were not also motivated by a segregative intent. The court held that operational de jure segregation could be found in states other than the 17 that maintained dual school districts by law in 1954 and that the differentiating factor between de jure segregation and so-called de facto segregation . . . "is purpose or intent to segregate."[12] Thus, in Keyes, the Supreme Court ruled that "intentional" segregation, whether or not imposed by statute, is unconstitutional.

Justice Powell, in a separate opinion in Keyes, urged the Court to abandon the distinction between de jure and de facto desegregation in its decisions.[13] He stated that segregation in schools outside the South was fully as pervasive as that in southern cities prior to the desegregation decrees of the past

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[11] 313 F.Supp. 90 (D. Colo. 1970), aff'd in part. rev'd in part, 445 F.2d 990 (10th Cir. 1971), modified and remanded, 413 U.S. 189 (1973).

[12] Id., 413 U.S. at 201-208.

[13] Id. at 219-224 (Powell, J., concurring in part, dissenting in part).

decade and a half. He also stated that the evil of operating separate schools was no less in Denver than it was in southern cities. Furthermore, he asserted that "public school authorities are the responsible agency of the State," and therefore, "if the affirmative-duty doctrine is sound constitutional law for Charlotte, it is equally so for Denver."[14]

In contrast to Justice Powell's viewpoint, Justice Rehnquist argued in his dissenting opinion that situations of de facto segregation should be treated differently than legally sanctioned segregation: "[I]n the absence of a statute requiring segregation there must necessarily be the sort of factual inquiry which was unnecessary in those jurisdictions where racial mixing in the schools was forbidden by law."[15] He further admonished the Court majority for sanctioning broad discretionary powers for federal judges to uncover unlawful school segregation:

> Underlying the Court's entire opinion is its apparent thesis that a district judge is at least permitted to find that if a single attendance zone between two individual schools in the large metropolitan district is found by him to have been 'gerrymandered,' the school district is guilty of operating a 'dual' school system, and is apparently a candidate for what is in practice a federal receivership.[16]

Despite the lack of agreement as to whether the Court majority went too far or not far enough in eliminating the de jure/de facto double standard, the Keyes opinion did establish that the essential ingredient of unlawful de jure segregation outside the South is a finding of "segregatory intent." However, the meaning of "segregatory intent" was left judicially unclear.

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[14] Id. at 224.

[15] Id. at 256 (Rehnquist, J., dissenting).

[16] Id. at 257.

Such ambiguity in Supreme Court guidance has nurtured diversity in lower court interpretations of the constitutional mandates. Some courts have sought specific proof of intent while others have viewed intent as inferrable from actions where the predictable consequences are segregatory.[17]

Many egalitarians anxiously awaited the Supreme Court decision regarding segregation in the Detroit public schools in hopes that the ruling would offer the much needed clarification vis-a-vis the legality of de facto segregation. In this case, Milliken v. Bradley, the Supreme Court overruled both the federal district court and the Sixth Circuit Court of Appeals that had required multidistrict desegregation involving Detroit and the surrounding suburban districts.[18] Under the district court's order, desegregation would have been effected by a metropolitan plan embracing Detroit and 53 outlying districts. In reversing the lower courts, the Supreme Court held that a multidistrict, area-wide remedy for single-district de jure school segregation violations may not be imposed where there is no finding that the other school districts failed to operate unitary school systems or committed acts that enhanced segregation within the de jure district. Furthermore, the Court majority concluded that the district boundary lines had been established with no intent to foster racial segregation. The majority emphasized that school district lines may not be casually ignored because the concept of local control of public education is a deeply rooted tradition in this country.

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[17] See notes 1-6, supra.

[18] Milliken v. Bradley, 338 F.Supp. 582 (E.D. Mich. 1971), 345 F.Supp. 914 (E.D. Mich. 1972), aff'd 484 F.2d 215 (6th Cir. 1973), rev'd 418 U.S. 717 (1974).

Justice Douglas, in his dissenting opinion, took issue with the majority position and argued: "If this were a sewage problem or a water problem, or an energy problem, there can be no doubt that Michigan would stay well within federal constitutional bounds if it sought a metropolitan remedy."[19] Although the Detroit decision is used to support the contention that cross-district remedies should not be employed in desegregation cases, the Supreme Court actually did not state that interdistrict remedies never would be appropriate. Instead, the Court cautioned lower courts to be sure that the scope of their remedial decree equates the constitutional violation uncovered.

Even though the Supreme Court reluctantly entered the de jure/de facto controversy, it has delivered several recent proclamations in cases involving Pasadena, Austin, Indianapolis, and Dayton which appear to be broadening the de jure/de facto gulf and narrowing the grounds for finding unconstitutional school segregation.[20] The touchstone in these cases has been an assessment of the racial neutrality of governmental motives. Consequently, the Court has concluded that some segregated school districts have no affirmative duty to eliminate racial isolation as long as the districts themselves have not intended to create the segregated conditions.

A New Theory of Discrimination: Impact Versus Motive

It is evident that the Supreme Court is hesitant to expand its interpretation of constitutional guarantees and to sanction broad remedial tools

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[19] Id., 418 U.S. at 717 (Douglas, J., dissenting).

[20] See notes 29-34; infra.

for the elimination of school segregation. Although civil rights activists have turned to federal statutory provisions in hopes of gaining greater relief than is currently possible when challenges are based solely on federal constitutional guarantees, there is meager evidence that this approach will provide acceptable solutions. Recently, the Supreme Court has interpreted civil rights statutes as narrowly as possible, thereby limiting rather than expanding the protections afforded to citizens under these acts.[21] Furthermore, little deference is being given to federal agency regulations in deciding cases.[22]

The Supreme Court's posture in desegregation litigation cannot be divorced from its stance in addressing all types of discrimination. It may be that the creation and demise of a theory of discrimination has taken place within the past six years. In 1971 the Supreme Court articulated the "disparate impact" principle for evaluating the legality of policies under Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment on the basis of race, creed, national origin or sex. In Griggs v. Duke Power Company, a case involving racial discrimination, the Court declared that proof of intent was not necessary to establish unlawful discrimination.[23] According to the Court majority in Griggs, Congress directed Title VII "to the consequences of employment practices, not simply the motivation."[24] Thus, practices with a disparate impact on a protected class

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[21]See for example, General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

[22]See for example, Romeo Community Schools v. Department of Health, Education and Welfare, 14 FEP cases 1177 (1977).

[23]401 U.S. 424 (1971).

[24]Id. at 432.

had to be accompanied by evidence that they were necessary to job performance in order to withstand judicial scrutiny under Title VII.

The "disparate impact" theory, although grounded in Title VII, began to influence constitutional litigation as well. However, this development came to a halt in 1976 with the Supreme Court's decision in Washington v. Davis.[25] In this case plaintiffs were black applicants for admission to the police training program of the District of Columbia who were rejected because of their low scores on a verbal skills test (Test 21) given to all applicants. The trial record showed that four times as many blacks as whites were eliminated by the test. Hence, the appeals court concluded that plaintiffs' due process rights had been impaired because police officials failed to conform to the Title VII standard set out in Griggs. In essence, the appellate court found that because the verbal skills test had a disproportionate impact on blacks and was not substantiated as related to job performance, the plaintiffs' constitutional rights had been abridged. However, the Supreme Court reversed the holding of the Court of Appeals. Justice White, writing for the Supreme Court majority, declared that the appellate court erred when it equated Title VII standards and constitutional standards. While recognizing the Griggs principle, the Court majority in Davis emphatically stated that evidence of a disparate impact alone will not evoke constitutional guarantees. Aggrieved individuals must also show that the challenged policy is an intentional device to disadvantage a protected class. Consequently, a disproportionate impact must be accompanied by unlawful motive in order to abridge the United States Constitution.

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[25] 96 S.Ct. 2040 (1976).

The Court majority found that the verbal skills test in Washington v. Davis was used for a permissible purpose--to improve police effectiveness--and without discriminatory intent. The majority concluded that the Federal Constitution and the Civil Service Act (5 U.S.C. § 3304) permitted the use of a test that predicts performance in a job training program rather than performance in the job itself. Approving the district court's holding on that point, the Court declared:

> Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. . . . [This conclusion] seems to us the much more sensible construction of the job-relatedness requirement.[26]

While Justice Stevens concurred with the majority opinion, he stressed that racial impact may often be sufficient proof of discriminatory intent and that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."[27]

The dissenters in Washington v. Davis, Justices Brennan and Marshall, rejected the majority's definition of "job-relatedness" in testing.[28] They asserted that the regulations of both the Civil Service Commission and the Equal Employment Opportunity Commission, as well as the Court's decision in Griggs, require that an employment test be related to actual job

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[26] Id at 2052-53.

[27] Id. at 2054 (Stephens, J., concurring).

[28] Id at 2055-2062 (Brennan, J., Marshall, J., dissenting).

performance. Brennan and Marshall were unwilling even to concede that the test in question measured success in the training program.

Several desegregation orders have followed the logic outlined in Washington v. Davis. In a 6-2 decision involving Pasadena, California, the Supreme Court majority ruled that the district court was not entitled to require the school district to rearrange its attendance zones each year to insure that the desired racial mix was maintained in perpetuity as long as the initial implementation of a desegregation plan had accomplished its objective.[29] Justice Rehnquist, delivering the majority opinion, stated that having once achieved a racially-neutral attendance pattern, the district court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

In a subsequent case involving Austin, Texas, the main issue was the constitutionality of the city's neighborhood school policy.[30] The Fifth Circuit Court of Appeals had found that the implementation of a neighborhood school plan in Austin created intentional school segregation due to the existing residential segregation. To remedy this intentional discrimination, the appellate court ordered a massive busing plan involving approximately 40% of Austin's 60,000 students. The United States Supreme Court, however, vacated the court of appeals decision and remanded the case for reconsideration in light of Washington v. Davis. Accompanying the one sentence order was a four-page concurring opinion written by Justice Powell in which he admonished the court of appeals for ordering a busing plan more extensive than necessary to correct any constitutional violation committed by the school board.

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[29]Pasadena City Bd. of Educ. v. Spangler, 96 S.Ct. 416 (1976).

[30]Austin Indepen. School Dist. v. United States, 97 S.Ct. 517 (1976).

Furthermore, Powell contended that the plan required annual readjustments in student assignment zones to counteract the effects of changing residential patterns which was in direct conflict with the Supreme Court's proclamation in the Pasadena case.[31]

One month after the Austin desegregation decision, the Supreme Court delivered an opinion in Village of Arlington Heights v. Metropolitan Housing Development Corporation.[32] In this case, a racial discrimination suit was filed because Arlington Heights refused to rezone to allow a moderate and low income housing project to be built within its boundaries. The Seventh Circuit Court of Appeals held that because the ultimate effect of the refusal to rezone was racially discriminatory, the Village Planning Commission's actions violated the equal protection clause. However, the Supreme Court reversed the decision. Justice Powell, writing for the majority, articulated that plaintiffs did not bear the burden of proving that race was a motivating factor in the planning commission's decision.

Two weeks after Arlington Heights was handed down, the Supreme Court issued an unsigned, one-sentence order in which it vacated the ruling of the Seventh Circuit Court of Appeals regarding desegregation of the Indianapolis public schools.[33] In July, 1976 the appellate court had ordered that 6,500 black students be bused from the inner city to schools in surrounding predominantly white suburbs. The cross-district busing plan was based on the finding that the state had contributed to racial segregation by leaving school district lines intact when it created a metropolitan government for

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[31] Pasadena, supra..

[32] 97 S.Ct. 555 (1977).

[33] Metropolitan School District v. Buckley, 97 S.Ct. 802 (1977).

all municipalities, including Indianapolis, within Marion County. However, the Supreme Court ordered the lower courts to reconsider the Indianapolis case in light of the decisions in Davis and Arlington Heights. Thus, the lengthy litigation involving desegregation in Indianapolis remains unsettled.

In a school desegregation case involving Dayton, the Supreme Court seemed to follow the Davis doctrine in limiting its finding of unconstitutional segregative practices.[34] The Court found a disparity between evidence of constitutional violations in Dayton and the "sweeping remedy" imposed by the courts and thus remanded the case for further review. Subsequently, the federal district court endorsed school board action to dismantle the desegregation plan. Although additional appeals are in progress, it seems doubtful that a large scale busing program will be carried out in Dayton.[35] Wilmington, Delaware also recently received another reprieve from implementing a massive student reassignment plan to achieve desegregated schools. Following the Supreme Court's direction, the federal district court in Delaware ruled that it was educationally unsound and administratively undesirable to begin desegregation until the fall of 1978 in Wilmington. As a result, the suit initiated in 1971 is still under investigation while schools in Wilmington remain segregated.[36]

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[34]Dayton Bd. of Educ. v. Brinkman, 45 USLW 4910 (June 27, 1977).

[35]However, the controversy continues as two weeks after the school board voted to scrap its current desegregation plan, the Sixth Circuit Court of Appeals ordered the school district to continue its court-ordered busing program pending an appeal by the NAACP, Education Daily, January 18, 1978. The fate of court-ordered busing in Dayton, therefore, is still undecided.

[36]See Evans v. Buchanan, 423 U.S. 963 (1975), 425 U.S. 950 (1976), 46 USLW 3162 (September 20, 1977). See also Education U.S.A. November 14, 1977.

In cases following the Washington v. Davis guideline, the Supreme Court has reiterated that an official action will not be ruled unconstitutional solely because it results in a racially disproportionate impact. Although recognizing that the resulting discriminatory effect is not irrelevant, the Supreme Court has emphasized that unlawful motive is the necessary trigger to abridge constitutional guarantees. Thus, the crux of the northern desegregation dilemma hinges on the distinction between motive and impact, and in recent cases plaintiffs have been forced to carry a heavier burden of proof in establishing that unlawful motives exist. The Supreme Court has indicated that 'benign neglect' alone does not abridge constitutional guarantees. Some overt, intentional act to disadvantage protected groups must be present in order to evoke a federal remedy. This demonstration of direct unlawful intent poses a formidable obstacle for those seeking relief against alleged discrimination. If the Supreme Court continues to declare that intent cannot be inferred from observable actions, then desegregation remedies may not be required in many situations currently being contested.[37]

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[37] Although the Supreme Court seemingly is taking a tougher position on limiting the use of busing to achieve desegregation, a few decisions have partially muddied the waters. On the same day as the Indianapolis order the Supreme Court refused to overturn a lower court ruling which required that each elementary school in Louisville, Kentucky have an enrollment of between 12% and 35% black. The Supreme Court's position was that the lower courts did not abuse their discretion by adopting stricter desegregation guidelines than those urged by city officials, Bd. of Educ. of Jefferson County v. Newburg Area Council, Inc., 45 USLW 3503 (January 25, 1977). Also, in May, 1977 the federal court for the southern district of Ohio ruled that Columbus schools were guilty of intentional racial segregation because the board had maintained and enhanced racial imbalance by using such techniques as optional attendance zones, Penick v. Columbus Bd. of Educ., 429 F.Supp. 229 (S.D. Ohio, 1977). In a case involving Omaha, Nebraska, the Eighth Circuit Court of Appeals held that there was evidence of discriminatory motivation because the natural and foreseeable consequences of the school district's actions were to create and maintain segregation, School Dist. of Omaha v. United States, 541 F.2d 708 (8th Cir. 1977), 46 USLW 3421 (January 3, 1978).

Indeed, Washington v. Davis may mark an important shift in the interpretation of the United States Constitution. In the years since Griggs v. Duke Power Company, policies which appeared "neutral" on their face, yet had a disparate racial impact, were viewed with suspicion by the courts. Defendants were faced with the burden of proving that their acts or policies were compelling. In Griggs, the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964 implied that intent was not relevant if an act or policy proved to be discriminatory in effect. However, cases using the analytical approach to discrimination outlined in Washington v. Davis appear to be eroding the protections articulated in Griggs.

Even though the Supreme Court continues to affirm its allegiance to Griggs for statutory review, its recent decision in General Electric Company v. Gilbert, a case involving alleged sex discrimination in employment, indicates that the constitutional principle is influencing judicial analysis of alleged discriminatory practices under Title VII.[38] The challenge in Gilbert was based on Title VII grounds, but nonetheless the Court relied heavily on the constitutional arguments in upholding a disability benefits policy with a disproportionate effect on women. The mere fact that the policy had a dramatically different impact on the two sexes did not convince the Supreme Court that a Title VII violation was involved.

This recent judicial posture is ripe with implications for future litigation, not only involving school desegregation, but also regarding the entire spectrum of civil rights. It can be extrapolated that state officials have no duty to remedy situations where practices have a disparate impact on

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[38] 429 U.S. 125 (1976).

vulnerable minorities or to give preferential treatment to any group due to past disadvantages. The Supreme Court seems alarmingly close to ruling that the state can stand by and watch discrimination take place as long as government officials do not encourage the discriminatory practices. In short, policies which impact differently on various groups will be sanctioned as long as motives are deemed to be pure.

Therefore, it appears that the Supreme Court has traveled a complete circle, renouncing the "disparate impact" doctrine for constitutional analysis and substantially eroding its potency for statutory review. How far the courts will carry this line of logic remains to be gleaned from the progeny of Davis and Gilbert, but it seems likely that the Supreme Court will continue to limit the scope of federal protections and thus force individuals to seek relief from discriminatory practices under state constitutional and statutory provisions.

Unless the Supreme Court gives the "motive/impact distinction" an innocuous meaning that preserves the dictum in Griggs, the power and the duty of school districts to correct school segregation may be eroded. There is no scientific standard that can be employed to measure the specific intent or purposes behind one's acts or policies. It is a fairly objective task to evaluate whether or not segregation exists, but it is much more difficult to establish with certainty that a governmental agency's intentions are pure. Is a mere declaration of one's motives enough to establish that honorable intentions are present regardless of the disastrous results that the actions may produce? Or stated another way, how devastating must the results be in order for a discriminatory intent to be inferred? It is disheartening when one realizes that these questions remain as clouded,

if not more so, than they were in 1954 when the landmark Brown decision was delivered. If a protected class may not rely upon social science evidence regarding the disproportionate impact of certain school practices as "proof" of racial discrimination, the mandate of Brown may soon become meaningless.

It is difficult to evaluate whether recent desegregation orders are indicators of a larger systemic change in the law of civil rights or whether the decisions should be viewed in isolation as having little precedential value.[39] It may be that litigation involving school desegregation is part of a more global legal phenomenon signaling judicial retrenchment from the activist Warren Court era. Indeed, this decade may be witnessing the emergence of a new definition of discrimination.

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[39] See Thomas L. Flygare, "Austin and Indianapolis: A New Approach to Desegregation?" Phi Delta Kappan, vol. 58, no. 9, May, 1977, p. 709.